

Suchitra

**IN THE HIGH COURT OF BOMBAY AT GOA**

**FIRST APPEAL NO.10/2020  
WITH  
CIVIL APPLICATION NO.29-2020  
WITH  
MISC. CIVIL APPLICATION NO.2189-2023 (F)**

AYUB KHAN, age 36 years, Indian  
National, Occupation Business,  
resident of House No.100/3(1), Tivim  
Auchitwada, Bardez Goa. ... APPELLANT

***Versus***

1. THE STATE OF GOA, through its  
Chief Secretary, Secretariat Office,  
Porvorim, Goa.
2. COLLECTOR, NORTH GOA,  
Collectorate Building, Panaji, Goa.
3. Shri N. M. Gad, (deleted as per  
order dated 07.09.2023)
3. ADMINISTRATOR OF Comunidades  
of North Zone, Mapusa, Bardez Goa.
4. COMUNIDADE OF TIVIM, ... RESPONDENTS  
through its Attorney, Tivim, Bardez Goa.

**FIRST APPEAL NO.11/2020  
WITH  
CIVIL APPLICATION NO.30/2020  
WITH  
MISC. CIVIL APPLICATION NO.2190/2023 (F)**

KHURSHIDA AHMAD,  
age 45 years, Indian National,

Occupation Business,  
resident of House no. 1009/3 (4)  
Tivim Auchitwada, Bardez Goa.

... APPELLANT

*Versus*

1. THE STATE OF GOA, through  
its Chief Secretary, Secretariat  
Office, Porvorim, Goa.

2. COLLECTOR, NORTH GOA,  
Collectorate Building, Panaji, Goa.

3. Shri N. M. Gad, (deleted as per  
order dated 07.09.2023)

3. ADMINISTRATOR OF  
ComunidadeS of North Zone,  
Mapusa, Bardez Goa.

4. COMUNIDADE OF TIVIM,  
through its Attorney, Tivim,  
Bardez Goa.

... RESPONDENTS

**FIRST APPEAL NO.12/2020  
WITH  
CIVIL APPLICATION NO.31/2020  
WITH  
MISC. CIVIL APPLICATION NO.2191/2023 (F)**

SALIM SANDHI, major of age,  
age 42 years, Indian National,  
Occupation Business, resident of  
House no.100/3(9), Tivim,  
Auchitwada, Bardez Goa.

... APPELLANT

*Versus*

1. THE STATE OF GOA, through  
its Chief Secretary, Secretariat  
Office, Porvorim, Goa.

2. COLLECTOR, NORTH GOA,  
Collectorate Building, Panaji, Goa.

3. Shri N. M. Gad, (deleted as per  
order dated 07.09.2023)

3. ADMINISTRATOR OF  
ComunidadeS of North Zone,  
Mapusa, Bardez Goa.

4. COMUNIDADE OF TIVIM,  
through its Attorney, Tivim,  
Bardez Goa.

... RESPONDENTS

**FIRST APPEAL NO.13/2020  
WITH  
CIVIL APPLICATION NO.32/2020  
WITH  
MISC. CIVIL APPLICATION NO.2193/2023 (F)**

MEHMOOD A. ANSARI,  
major of age, Indian National,  
resident of House no.NIL,  
Tivim Auchitwada, Bardez-Goa.

... APPELLANT

***Versus***

1. THE STATE OF GOA, through  
its Chief Secretary, Secretariat  
Office, Porvorim, Goa.

2. COLLECTOR, NORTH GOA,  
Collectorate Building, Panaji, Goa.

3. Shri N. M. Gad, (deleted as per  
order dated 07.08.2023)

3. ADMINISTRATOR OF  
Comunidades of North Zone,  
Mapusa, Bardez Goa.

4. COMUNIDADE OF TIVIM,  
through its Attorney, Tivim,  
Bardez Goa.

... RESPONDENTS

**FIRST APPEAL NO.14/2020  
WITH  
CIVIL APPLICATION NO.33/2020  
WITH  
MISC. CIVIL APPLICATION NO.2192/2023 (F)**

DADAPIR LOHAR, Major of age,  
Indian National, resident of  
House no. 100/3, Tivim  
Auchitwada, Bardez Goa.

... APPELLANT

***Versus***

1. THE STATE OF GOA, through  
its Chief Secretary, Secretariat  
Office, Porvorim, Goa.

2. COLLECTOR, NORTH GOA,  
Collectorate Building, Panaji, Goa.

3. Shri N. M. Gad, (deleted as per  
order dated 07.09.2023)

3. ADMINISTRATOR OF  
Comunidades of North Zone,  
Mapusa, Bardez Goa.

4. COMUNIDADE OF TIVIM,  
through its Attorney, Tivim,  
Bardez Goa.

... RESPONDENTS

**FIRST APPEAL NO.57/2022  
WITH  
CIVIL APPLICATION NO.53/2022  
WITH  
MISC. CIVIL APPLICATION NO.2222/2023 (F)**

**WITH  
MISC. CIVIL APPLICATION NO.2235/2023 (F)**

ABDUL SATTAR SHAIKH,  
55 years of age (since deceased  
through legal heirs)

(a) Nazima Shaik, Wife of late  
Abdul S. Shaikh 20 your of age,  
Indian National,

(b) Muskan Shaikh, daughter of late  
Abdul S. Shaikh, 18 years of age,  
Indian National,

(c) Mohamed Khadar Shaikh, son of  
late Abdul S. Shaikh 21 years of age,  
Indian National,  
All r/o H.no. 100/3, Auchit Waddo,  
Tivim, Bardez, Goa.

... APPELLANTS

***Versus***

1. THE STATE OF GOA, through  
its Chief Secretary, Secretariat  
Office, Porvorim, Goa.

2. COLLECTOR, NORTH GOA,  
Collectorate Building, Panaji, Goa.

3. Shri N. M. Gad, (deleted as per  
order dated 07.08.2023)

3. ADMINISTRATOR OF  
Comunidades of North Zone,  
Mapusa, Bardez Goa.

4. COMUNIDADE OF TIVIM,  
through its Attorney, Tivim,  
Bardez Goa.

... RESPONDENTS

**FIRST APPEAL NO.59/2022  
WITH  
CIVIL APPLICATION NO.54/2022  
WITH  
MISC. CIVIL APPLICATION NO.2221/2023 (F)  
WITH  
MISC. CIVIL APPLICATION NO.2234/2023 (F)**

IBRAHIM SAB, 55 years of age,  
Indian National, resident of  
House no.100/3 (i), Tivim,  
Auchitwada, Bardez Goa. ... APPELLANT

***Versus***

1. THE STATE OF GOA, through  
its Chief Secretary, Secretariat  
Office, Porvorim, Goa.

2. COLLECTOR, NORTH GOA,  
Collectorate Building, Panaji, Goa.

3. Shri N. M. Gad, (deleted as per  
order dated 07.08.2023)

3. ADMINISTRATOR OF  
Comunidades of North Zone,  
Mapusa, Bardez Goa.

4. COMUNIDADE OF TIVIM,  
through its Attorney, Tivim,  
Bardez Goa. ... RESPONDENTS

**FIRST APPEAL NO.60/2022  
WITH  
CIVIL APPLICATION NO.55/2022  
WITH  
MISC. CIVIL APPLICATION NO.2223/2023 (F)  
WITH  
MISC. CIVIL APPLICATION NO.2236/2023 (F)**

SALIM M.G. SHAIKH,  
56 years of age, Indian National,  
resident of House no.  
Tivim, Auchitwada, Bardez Goa.

... APPELLANT

*Versus*

1. THE STATE OF GOA, through  
its Chief Secretary, Secretariat  
Office, Porvorim, Goa.

2. COLLECTOR, NORTH GOA,  
Collectorate Building, Panaji, Goa.

3. Shri N. M. Gad, (deleted as per  
order dated 07.08.2023)

3. ADMINISTRATOR OF  
Comunidades of North Zone,  
Mapusa, Bardez Goa.

4. COMUNIDADE OF TIVIM, through  
its Attorney, Tivim, Bardez Goa.

... RESPONDENTS

**FIRST APPEAL NO.61/2022  
WITH  
CIVIL APPLICATION NO.56/2022  
WITH  
MISC. CIVIL APPLICATION NO.2219/2023 (F)  
WITH  
MISC. CIVIL APPLICATION NO.2241/2023 (F)**

PRAMOD PANDURANG SHINDE  
45 years of age, Indian National,  
Occupation Service, resident of  
House no.1352, Tivim,  
Auchitwada, Bardez Goa.

... APPELLANT

*Versus*

1. THE STATE OF GOA, through  
its Chief Secretary, Secretariat

Office, Porvorim, Goa.

2. COLLECTOR, NORTH GOA,  
Collectorate Building, Panaji, Goa.

3. Shri N. M. Gad, (deleted as per  
order dated 07.08.2023)

3. ADMINISTRATOR OF  
Comunidades of North Zone,  
Mapusa, Bardez Goa.

4. COMUNIDADE OF TIVIM,  
through its Attorney, Tivim,  
Bardez Goa.

... RESPONDENTS

**FIRST APPEAL NO.62/2022  
WITH  
CIVIL APPLICATION NO.57/2022  
WITH  
MISC. CIVIL APPLICATION NO.2218/2023 (F)  
WITH  
MISC. CIVIL APPLICATION NO.2233/2023 (F)**

NOOR AHMED DOLLESHWAR,  
59 years of age, Indian National,  
resident of House no.  
Tivim, Auchitwada, Bardez Goa.

... APPELLANT

***Versus***

1. THE STATE OF GOA, through  
its Chief Secretary, Secretariat  
Office, Porvorim, Goa.

2. COLLECTOR, NORTH GOA,  
Collectorate Building, Panaji, Goa.

3. Shri N. M. Gad, (deleted as per  
order dated 07.08.2023)



3. ADMINISTRATOR OF  
Comunidades of North Zone,  
Mapusa, Bardez Goa.

4. COMUNIDADE OF TIVIM,  
through its Attorney, Tivim,  
Bardez Goa.

... RESPONDENTS

**FIRST APPEAL NO.70/2022  
WITH  
CIVIL APPLICATION NO.70/2022  
WITH  
MISC. CIVIL APPLICATION NO.2220/2023 (F)  
WITH  
MISC. CIVIL APPLICATION NO.2237/2023 (F)**

ISMAIL CHAPPERBAND,  
53 years of age, Indian National,  
resident of House no.100/6,  
Tivim, Auchitwada, Bardez Goa.

... APPELLANT

***Versus***

1. THE STATE OF GOA, through  
its Chief Secretary, Secretariat  
Office, Porvorim, Goa.

2. COLLECTOR, NORTH GOA,  
Collectorate Building, Panaji, Goa.

3. Shri N. M. Gad, (deleted as per  
order dated 07.08.2023)

3. ADMINISTRATOR OF  
Comunidades of North Zone,  
Mapusa, Bardez Goa.

4. COMUNIDADE OF TIVIM, through  
its Attorney, Tivim, Bardez Goa.

... RESPONDENTS

Ms. A. A. Agni, Senior Advocate with Ms. Afrin Harihar Khan  
and Mr. Junaid Shaikh, Advocates for the Appellants/Applicants.

Mr. Nigel da Costa Frias with Mr. Shane Coutinho, Advocates for Respondent No. 4 in all First Appeals and for Respondent No.5 in FA-70-2022

Ms. Sapna Mordekar, Additional Government Advocate for Respondent-State in FA-10-2020 and FA-62-2022

Ms. Sulekha Kamat, Additional Government Advocate for Respondent-State in FA-11-2020 and FA-57-2022.

Mr. Manish Salkar, Government Advocate for Respondent-State in FA-12-2020 and FA-13-2020 Mr. Pravin Faldessai, Additional Government Advocate for Respondent - State in FA-14-2020.

Mr. Suhas Parab, Additional Government Advocate for Respondent-State in FA-59-2022 Ms. Akshata Bhat, Additional Government Advocate for Respondent - State in FA-60-2022.

Mr. Tukaram Gawas, Additional Government Advocate for Respondent - State in FA-61-2022 Mr. Geetesh Shetye, Additional Government Advocate for Respondent-State in FA-70-2022.

Mr. P.A. Kamat, Advocate for Respondent No. 5 in FA-59-2022.

CORAM: M. S. SONAK, J.

Reserved on: 26<sup>th</sup> OCTOBER 2023

Pronounced on: 1<sup>st</sup> NOVEMBER 2023

**JUDGMENT:**

1. Heard Mrs A. Agni, learned Senior Advocate, who appears along with Ms A. Harihar for the appellants in all these appeals. Ms S. Mordekar, learned Additional Government Advocate for respondents no.1, 2 and 3 in First Appeal No.10/2020 and First

Appeal No.62/2022 and Ms Sulekha Kamat learned Additional Government Advocate for respondents No. 1, 2 and 3 in First Appeal No.11/2020 and First Appeal No.57/2022 and Mr Nigel da Costa Frias for respondent no.4.

2. All these appeals are directed against judgments and decrees dated 05.12.2019 made by the District Court (Trial Court) in separate but almost identical suits instituted by the appellants to question the orders of removal of encroachments carried out by the appellants on the Comunidade property.

3. Learned counsel for the parties agree that a common judgment and order can dispose of these appeals and the Misc. Civil applications since they involve substantially similar issues of law and fact. They request that First Appeal No.12/2020 be taken as the lead matter.

4. In First Appeal No.12/2020, the appellant is the original plaintiff, and the respondents are the original defendants in Civil Suit No.32/2011 instituted before the learned District Judge-1, North Goa at Panaji.

5. By the impugned judgment and decree dated 05.12.2019, the learned District Judge dismissed this Suit with costs. Hence the present appeal. In the appeal, the appellants have filed an application under Order 41, Rule 27 of the Civil Procedure Code (CPC), which application was considered at the final hearing stage and is disposed of by this judgment and order.

**APPELLANT'S CONTENTIONS:**

6. Mrs Agni raised three main contentions in support of this appeal. First, she contented that the constructions put up by the appellants were regularisable and deserved to be regularised under Article 372-A of the Code of Comunidades. Second, she contented that the impugned order/notice dated 24.01.2011 issued by the Administrator of Comunidades (third respondent) was null and void because the same was in breach of the principles of natural justice and fair play. Thirdly, she contented that the appellant's application for regularisation of the suit structure made under Article 372-A of the Code of Comunidades, 1961 (Code) was pending before the Collector. Therefore, until such an application was disposed of, the third respondent's order dated 24.01.2011 could not or at least should not be enforced.

7. Regarding the first contention, Mrs Agni submitted that the appellants put up the constructions on the Comunidade property before the cut-off date of 15.06.2000. She submitted that the Comunidade's clerk issued NOC. So, irrespective of the legal efficacy of such NOCs, the appellants were not rank encroachers. She submitted that regularisation was duly applied for, and documents supporting this plea are produced along with the applications under Order 41 Rule 27 of CPC. She submitted that no cut-off date was provided under Article 372-A of the Code as was held by this Court in *Mrs Martha Luis v/s. State of Goa & Ors. (Writ Petition No.275/2012 decided on 12.03.2020)*. She, therefore, submitted that the suit structures

put up by the appellants must be regularised, and the issue which was cast in the suits must be answered favouring the appellants.

8. Mrs Agni submitted that *Syed Muzaffar Ali & Ors. v/s. Municipal Corporation of Delhi – 1995 Supp (4) SCC 426* supports the appellant's case for regularisation of the construction. In any case, she submits that there is specific power granted to the Collector under Article 372-A to regularise constructions on Comunidade land, provided such constructions were put up before the cut-off date of 15.06.2000. She submits that the appellant's constructions were put up before 15.06.2000, and irrespective of the date of the application for regularisation, the Collector had a duty to regularise such constructions. Mrs Agni submitted that the decision in *Ashok Mukund Harmalkar v/s. CRZ Infrastructure and Building Construction, Ministry of Environment, Forest and Climate Change, Government of India & Ors. (Writ Petition No.648/2023 decided on 26.10.2023)* was distinguishable because in the present appeals, there was no allegation of breach of the CRZ notification.

9. Regarding the second contention, Mrs Agni contended that even though a show cause notice dated 06.04.2009 was issued to the appellant and the appellant responded to the same, no notice or, in any case, hearing was granted to the appellant before the third respondent made the impugned order dated 24.01.2011. She submitted that since this was the final order based upon some sort of remand by the Under Secretary in his order dated 09.04.2010, the third respondent was duty-bound to hear the appellant and having failed to do so, the impugned order dated

24.01.2011 was a nullity, being in breach of principles of natural justice and fair play. She relied on *Canara Bank & Ors. v/s. Debasis Das & Ors. – (2003) 4 SCC 557* in support of this contention.

10. Mrs Agni submitted that the trial court erred in invoking the “Empty Formality Theory” because the same was not applicable to the facts and circumstances of the present case. She submitted that the decision in *Secretary, Andhra Pradesh Social Welfare Residential Educational Institutions v/s. Pindiga Sridhar And Others – (2007) 13 SCC 352* was based on facts concerning a service matter, which bears no comparison with the facts in the present appeals. She, therefore, submitted that the trial court was not justified in relying upon the said decision and rejecting the appellant’s contention regarding the failure of natural justice and non-observance of fair play.

11. Regarding the third contention, Mrs Agni submitted that the appellant had put up a structure on the Comunidade land before 15.06.2000 even though the NOC produced was dated 04.05.2005. She submitted that no cut-off date was provided under Article 372-A of the Code as was held by this Court in *Mrs Martha Luis v/s. State of Goa & Ors. (Writ Petition No.275/2012 decided on 12.03.2020)*. She submitted that the application for regularisation was pending before the Collector, and such application and correspondences in that regard are now produced along with the application under Order 41, Rule 27 of CPC. Mrs Agni submitted that the appellant has a right to shelter, which is a basic human right. She submitted that pending

a decision on the appellant's application for regularisation, the impugned notice dated 24.01.2011 cannot or at least ought not to be enforced.

**12.** Mrs Agni submitted that the application under Order 41, Rule 27 of CPC deserves to be allowed because the additional evidence is mostly above board, and the same is necessary for pronouncement of an effective judgment in these matters. She relied on *State of Rajasthan v/s. T. N. Sahani & Ors. – (2001) 10 SCC 619* in support of this contention.

**13.** Mrs Agni submitted that the trial court had not non-suited the appellant on the ground that no suit was maintainable in these matters. She submitted that the suit was very much maintainable because the jurisdiction of the civil court was not barred either expressly or impliedly. She submitted that the trial court had rejected the plaint under Order 7, Rule 11 vide common judgment and order relying upon the provisions of Section 7 of the Goa Land (Prohibition on Construction) Act, 1995. However, this common judgment and order was set aside by this court in its common judgment and order dated 24.03.2017 in First Appeal No.65/2013 and the connected appeals.

**14.** Mrs Agni submitted that the decisions relied upon by the trial court to dismiss the suit were distinguishable and, therefore, not applicable to the present matters. She submitted that in *Chandrakant Rupo Gaude v/s. Village Panchayat of Marcaim & Ors. (Writ Petition No.812/2011 decided on 21.11.2017)* the

issue involved concerned the powers of the Deputy Director to assume the powers exercisable by a Panchayat where a Panchayat failed to act against an illegal construction. She submitted that though the appellant's structure may not have had any permissions from the Panchayat, in the suit, no relief was sought against the Panchayat, nor was the Panchayat made a party to the suit. Therefore, she submitted that the decision in *Chandrakant Rupo Gaude (supra)* was not relevant.

15. Mrs Agni submitted that in *Down Mangor Valley, Residents' Welfare Association & Anr. v/s. Mormugao Municipal Council & Ors. (Writ Petition No.251/2001 decided on 08.01.2002)* was also inapplicable because the same concerned the illegal constructions in the demarcated open spaces which was not the position in any of these appeals. Similarly, she submitted that the decision in *Nazar da Silva & Anr. v/s. State of Goa & Ors. (Writ Petition No.90/2000 decided on 12.07.2000)* was also distinguishable because the same concerned powers and duties of a Panchayat to act on complaints against illegal constructions. She submitted that this was not the issue in any of the appeals or the suits before the trial court.

16. Mrs Agni submitted that similar issues arise in all the connected appeals. She submitted charts in each of the appeals, mainly giving the relevant dates and the exhibits relied upon by the respective appellants. She submitted that the evidence produced in all the matters was similar and, therefore, the decision in the lead matter, i.e. First Appeal No.12/2020, would govern the decisions in the connected appeals. She submitted



that all these appeals may, therefore, be allowed and the impugned judgment and order be set aside.

**CONTENTIONS ON BEHALF OF THE COMUNIDADE AND THE STATE:**

17. Mr Nigel da Costa Frias, learned counsel for the Comunidade (fourth respondent), and Ms S. Mordekar, learned Additional Government Advocate for the State (respondents no.1, 2 and 3) submitted that the very institution of the suits by the appellants was a gross abuse of the legal process. They submitted that there was full compliance with the principles of natural justice and fair play. They submitted that the appellants even challenged the orders of demolition of the constructions which they forcefully put up on the Comunidade properties before the Administrative Tribunal, whose challenges were rejected by the Tribunal. They pointed out how the Tribunal's orders were never questioned by the appellants before this Court but based upon a fictional cause of action, and only to delay the execution of the demolition orders, suits were filed. They submitted that the suits were correctly dismissed by the trial court with costs, and such decrees warrant no interference whatsoever.

18. Mr Costa Frias and Ms Mordekar pointed out that in the complaints, there were no pleadings about the authority by which the appellants put up unauthorised structures upon the Comunidade property. A vague statement was made that the structures were put up with the consent of the Comunidade. There was not even a reference to some alleged NOC by the Comunidade. They pointed out that NOC purportedly signed by the clerk of the

Comunidade who had no authority whatsoever to issue such NOCs was produced during evidence. They pointed out how the NOCs were fabricated documents allegedly issued in the year 2005 or after that by the clerk without any authority. They pointed out how the document was most suspicious on its face apart from the fact that such document was not backed by any resolution of the Comunidade, any outward number or any record whatsoever of its issue. They pointed out how, under the Code of Comunidades, there was no provision to alienate Comunidade properties without the approval of the Government and without following the legal formalities prescribed under the Code. They submitted that the appellants were rank encroachers on the Comunidade properties, and it is pursuant to the orders made by the High Court that action was initiated against such encroachers. They pointed out how the appellants, in spite of being rank encroachers, have prevented the respondents from removing the encroachments in accordance with the law.

19. Mr Costa Frias submitted that there is no evidence whatsoever that the appellants put up their illegal constructions before 15.06.2000. He submits that the evidence on record overwhelmingly points out that the constructions were put up in or around the year 2005 based upon the *ultra vires* NOCs allegedly issued by the clerk of the Comunidade without any authority and without any approval from the Managing Committee or the Government. He submitted that the scanty documents produced on record by the appellants are also of years 2006, 2008, etc. He submitted that such constructions can never be regularised under Article 372-A of the Code.

20. Mr Costa Frias submitted that the appellants have applied for regularisation even after the impugned decree dismissed their suits in most cases. In any case, even if the applications for regularisation were made before the suits were dismissed, the applications are way beyond the period of 250 days prescribed under Article 372-A of the Code. Mr Costa Frias submitted that the applications for regularisation had to be made within 250 days from the date of such Article 372-A entered force. He submitted that this was a one-time window for regularization of constructions on Comunidade properties put up before 15.06.2000. He submitted that there was no provision for extension of this period and the appellants' applications being admittedly beyond 10.03.2002, warrant no consideration whatsoever. Based upon such applications, which are not even maintainable, the appellants cannot delay the execution of the impugned orders and, in the meanwhile, continue with their encroachments on Comunidade properties.

21. Mr Costa Frias submitted that *Martha Luis (supra)* is not an authority for the proposition that an application for regularisation of encroachment on Comunidade lands can be filed at any point of time or beyond 250 days from the date the provisions came into force. He submitted that such an issue was not even involved in the said matter and a stray sentence cannot be elevated to the status of *ratio decidendi*. He submitted that in any case, even the stray sentence, apart from being an *obiter dicta*, was vitiated by the rule of *per in curium*. He submitted that reading of the judgment in its entirety would show that the

provisions of Article 372-A were a one-time exception, and there was no question of either the Comunidades or the State Government expanding, unduly, the scope of such exception. Besides, Mr Costa Frias submitted that since this was an exception, the provision had to be strictly construed.

22. Mr Costa Frias and Ms Mordekar submitted that the appellants had applied for leave to amend their plaint and seek relief of a direction to the Collector to consider the appellants' cases for regularisation under Article 372-A of the Code. However, such an amendment was not allowed by the trial court and the appellants' petitions before this Court were also dismissed by order dated 08.08.2018 in Writ Petition No.661/2018. Accordingly, they submitted that the first contention now raised by Mrs Agni does not arise for determination.

23. Ms Mordekar relied on *Ashok Harmalkar (supra)*, *Ramnath Naik v/s. State of Goa & Ors. (Writ Petition No.131/2022 decided on 09.10.2023)*, *Sudesh Kurade v/s. State of Goa & Ors. (Writ Petition No.254/2023 decided on 27.09.2023)*, *Gurudas Vattu Chati Aldonkar v/s. State of Goa (Writ Petition No.284/2022 decided on 29.09.2022)*, *Jacinto M. Sequeira & 3 Ors. v/s. State of Goa & Ors. (Writ Petition No.192/2010 decided on 07.07.2010)*, *Jagpal Singh & Ors. v/s. State of Punjab & Ors. (Civil Appeal No.1132/2011 decided by the Hon'ble Supreme Court on 28.01.2011)*, *Adv. Aires Rodrigues v/s. Comunidade of Serula and Ors. (PIL Writ Petition No.25/2013 decided on 25.02.2014)*, *Raghupati Bhandari v/s. Comunidade of Bandora – 2021 SCC OnLine Bom 155*, *Miguel Francisco*

*Gonsalves v/s. State of Goa & Ors. (Writ Petition No.2181/2022 (F) decided on 01.12.2022)* in support of her contentions.

24. Mr Costa Frias and Ms Mordekar pointed out that a show cause notice dated 06.04.2009 was issued to the appellants, which was responded to by them. After due compliance with principles of natural justice final demolition notice dated 15.06.2009 was passed. The appellants appealed this order before the Administrative Tribunal, which appeal was dismissed on 25.02.2010. On 07.04.2010, a simple notice was issued to the appellants before the execution of the demolition order dated 15.06.2009, which had already attained finality after the Tribunal dismissed the appeal and the appellants did not carry the matter further to the High Court. After the Tribunal's order, no proceedings lay before the Government or the Revenue Secretary. Still, the appellants were represented, and the matter was disposed of by requiring the concerned authorities to investigate the matter. The impugned order dated 24.01.2011 was an order to execute the finalised demolition notice dated 15.06.2009, which the appellants did not even challenge before the appropriate authorities or even in the suit. The learned counsel, therefore, submitted that the very institution and prosecution of the suits was an abuse of the legal process aimed only at delaying the execution of the finalised notice. They submitted that there was full compliance with the principles of natural justice and fair play, and in any case, the trial court correctly invoked the Empty Formality Theory.

25. Ms Sulekha Kamat learned Additional Government Advocate who appeared for the first, second and third respondents in First Appeal No.11/2020 and No.57/2022 whilst adopting the arguments made by Mr Costa Frias and Ms Mordekar submitted that the suits in which the impugned judgments and decrees have been made were expressly or in any case impliedly barred. She relied upon the provisions of Section 7 of the Goa Land (Prohibition on Construction) Act, 1995. She also relied upon the provisions of the Code which had provided for alternate remedies which the appellants already availed. She relied on *Bata Shoe Co. Ltd. v/s. City of Jabalpur Corporation – (1977) 2 SCC 472* in support of her contentions.

26. Mrs Agni, in rejoinder, submitted that the suits were maintainable and, in any case, such issue could not be re-agitated after this Court set aside the trial court's orders rejecting the plaint under Order 7, Rule 11 of CPC on the same or in any case similar grounds. Mrs Agni submitted that if the orders are in breach of principles of natural justice and nullity, a suit is always maintainable to restrain the authorities from enforcing null and void orders. She submitted that even though the documents like building permission or NOC from the Panchayat may not have been produced, there was oral evidence to show that the constructions were made before 15.06.2000, which was the only cut-off date prescribed under Article 372-A of the Code. For all these reasons, Mrs Agni submitted that the appeals deserve to be allowed and the impugned judgments and decrees to be set aside.

### **EVALUATION OF THE RIVAL CONTENTIONS:**

**27.** The rival contentions now fall for my determination in these appeals.

**28.** The genesis of these appeals lies in the order of a Division Bench of this Court comprising A. S. Oka, J. (As his Lordship then was) and F. M. Reis, J. (As his Lordship then was), in the case of *Jacinto M. Sequeira & 3 Ors. v/s. State of Goa & 6 Ors. (W.P. No.192/2010 decided on 07.07.2010)* wherein the grievance of the Petitioner was the alleged large scale illegal usurpation of the Comunidade land and illegal constructions on the land vested in the Comunidade.

**29.** The Division Bench found that the Village Panchayat had initiated action against illegal encroachers on Comunidade land and directed the panchayat to demolish said structures, where no operating ad interim relief subsisted, and further that where orders for demolition were confirmed in appeal, the panchayat would have to carry out demolition as well. The Division Bench also directed the Collector to look into the allegations made by the petitioner and to initiate proceedings by exercising powers under Article 371 of the Code of Comunidade if he found it necessary. The writ petition was disposed of in the above terms, keeping open all the parties' contentions.

**30.** After the order of the Division Bench, proceedings were initiated against the appellants which concluded in making orders for demolition of the illegal constructions put up by the

appellants brazenly encroaching upon the Comunidade property. The appellants challenged the orders before the Administrative Tribunal, but the challenge failed. After that, the appellants represented to the Government/under secretary (revenue). Though no such proceedings were contemplated under the Code, the representations were made over to the Administrator of Comunidades, who made the order dated 24.01.2011 to implement or execute the final order/notice dated 15.06.2009 for demolition and removal of encroachment. After all this, the appellants instituted suits which were dismissed on merits by the impugned judgments and decrees. Hence, these appeals.

#### **APPLICATIONS UNDER ORDER 41 RULE 27 CPC:**

**31.** At the outset, the appellants' applications under Order 41, Rule 27 of CPC were taken up for consideration at the final hearing stage. By these applications, the appellants wish to produce on record the following documents:

A. Letter dated 9/04/2010 addressed by the Under Secretary Revenue to the Collector there by referring the appeal filed under Article 126 of the Code of Comunidade to the Collector;

B. Representation dated 21/03/2011 addressed to the secretary revenue under article 372(A) praying for regularisation of the construction/occupation of land in survey no.343/14;



C. Letter dated 10/05/2011 whereby the representation dated was made over to the collector by the secretary revenue;

D. Order dated 7/9/2023;

E. Reminder dated 12/09/2023 addressed to "the collector by the appellant requesting for hearing and consideration of the representation made under art.372(A) of the Comunidade code;

F. Notice dated 18.09.2023 fixing the date for hearing by the collector; and

G. Representation dated 26.09.2023 filed before the Collector by the appellant.

**32.** In paragraph 1 of the Civil Application No.2191/2023 (F) in First Appeal No.12/2020, the appellant has listed the above documents. In paragraph 2, the appellant has stated that one of the issues involved in the suit is whether his house can be regularised under the Code. The appellant has then argued that certain documents, which were now sought to be produced as additional evidence, had been handed over by the appellant to his advocate, but still the same were not produced on record in the course of evidence before the trial court. It is alleged that the advocate did not even remain present when the evidence was being recorded. In paragraph 3 of the application, allegations are made against the advocate regarding the conduct of evidence during the trial and even the conduct of the appeal before the High Court.

**33.** In paragraph 4 of the civil application, it is stated that only after the appellant came to know about the notice dated 23.08.2023 when demolitions were fixed on 10.09.2023 and 11.09.2023, the appellant approached the advocate, who then expressed inability to continue to appear in the matter. Then, it is stated that the appellants engaged different advocates to appear on their behalf in these matters.

**34.** In paragraph 5 of the application, there is a reference to the order dated 07.09.2023 by which the authorities postponed the demolitions. In paragraph 6, the appellants have stated that the documents at sr.no.5 to 7 could not be produced, again due to the fault of the advocate. In paragraph 7, it is stated that these documents are relevant to decide issue no.2 in the matter. In this paragraph, there is a reference to the decision in *State of Rajasthan v/s. T. N. Sahani (supra)*. It is stated that the appellant was not in any way responsible for the non-production of the documents, and the appellant had done all that he could by placing the documents in the hands of his advocate. In paragraph 8, there is a reference to the statement of the Government Advocate in Writ Petition No.660/2018. Paragraph 9 is the prayer that the documents be allowed under Order 41, Rule 27(d) of CPC.

**35.** Now, even if all the statements in the civil application are accepted at their face value, no case is made out for admission of the additional evidence or the documents. The application has been filed casually without giving any particulars either about the

relevancy or about due diligence. Bald allegations have been made against the previous advocates, and the usual case that a party should not suffer due to the advocate's fault is sought to be portrayed. None of the parameters under Order 41, Rule 27 of CPC are fulfilled for admission of the additional evidence or the documents. The decision cited by Mrs Agni also does not apply because the appellant's case is entirely different.

**36.** Despite the above position, it is proposed to consider the documents which the appellant seeks to produce based upon a demurrer. This is because even after considering such documents, no case is made out in this appeal or in the connected appeals to warrant interference with the impugned judgments and decrees for reasons to be discussed in this common judgment and order. Therefore, the appellants must not get the impression that their appeals were dismissed only because this additional evidence was not considered. Even after consideration of this additional evidence, no case is made out to warrant interference with the impugned judgments and decrees. Accordingly, all the applications under Order 41, Rule 27 of CPC are disposed of on these terms.

### **POINTS FOR DETERMINATION:**

**37.** Based upon the rival contentions, the points which arise for determination in this appeal are as follows:

- (a) Have the appellants established that the constructions put up by them on Comunidade

property were regularisable and deserve to be regularised?

- (b) Whether the impugned order dated 24.01.2011 made by the third respondent is void because of failure to observe principles of natural justice and fair play?
- (c) Whether the impugned order dated 24.01.2011 ought not to be enforced because of the pendency of the appellant's applications under Article 372-A of the Code for regularisation of the encroachments/ structures on Comunidade lands?

**38.** As noted earlier, these were the main grounds urged by Mrs Agni, learned Senior Advocate for the appellants. The remaining grounds or arguments urged by Mrs Agni revolved around the above three main points for determination and were mainly in response to the contentions raised by learned counsel for the respondents in defence of the impugned judgments and decrees.

**39.** The first point for determination is proposed to be considered only because the trial court cast issue (c), which reads as follows:

**40.** However, the Counsel for the respondents are justified in submitting that there is no relief in the plaint in the context of

the above issue. The reliefs, even in the amended plaint, read as follows: -

*“a) Order dated 24<sup>th</sup> January 2011 issued by the defendant nos 3 be declared as null and void and consequently be Set aside and by way of permanent injunction further restrain the defendant, its agents, servants and/or any other person acting on their behalf, be restrained from interfering with the plaintiff pursuant to the said order.*

*(b) By way of temporary injunction, restrain the defendant, its agents, seravants and/or any other person acting on their behalf, be restrained from interfering with the plaintiff pursuant to the said notice till the disposal of the present suit.*

*(c) Ad-interim relief in terms of the present suit.*

*(d) For costs*

*(e) By way of appropriate Judgment and Decree declare that the Order dated 9<sup>th</sup> November 2010 be declared as null and void and consequently be quashed and set aside and further by way of permanent injunction restrain the defendants, its agents, servants and/or any other person from interfering with the plaintiff suit house in any manner whatsoever nature or executing the said order dated 9<sup>th</sup> November 2010 against the plaintiff.*

*(g) By way Judgment and Decree quashed and set aside the show cause notice dated 18<sup>th</sup> February 2011 issued by the Village Panchayat of Tivim and order the Village Panchayat of Tivim to drop the proceeding.”*

41. As was urged by Mr Costa Frias and Ms Mordekar, the appellants did attempt to introduce the issue of regularisation by amending the plaint and seeking direction to the Collector to consider the appellants’ applications for regularisation. The following prayer clause was sought to be introduced in the plaints: “*(f) by way of appropriate Judgment and Decree direct the Defendant no.2 to consider the case of the plaintiff for regularisation in terms of Article 372-A of the amended Code of Comunidades and consequently direct the defendant no.2 to regularize the suit structure of the plaintiff, if in case, this courts comes to the conclusion that the suit structure of the plaintiff is unauthorized.*”

42. However, the trial court did not allow the above amendment. Therefore, the appellants instituted Writ Petitions No.660, 661, 662, 663, 664, 665, 667 of 2018 before this Court challenging the order dated 18.06.2011 to the extent the same did not allow the appellant to seek the above amendment. Learned Single Judge of this Court (C. V. Bhadang, J.) dismissed the Writ Petitions. Learned counsel for the appellants (petitioners in the said petitions), in all fairness, submitted that no relief of a direction to the Collector to regularise the structures could be

claimed by the appellants/petitioners. The petitions were dismissed, but the learned Additional Government Advocate's statement was recorded that in case the petitioners/ appellants approach the Collector, such applications would be decided in accordance with law.

43. Based on the above and the fact that issue (c) was cast, Mrs Agni submitted that the issue of regularisation was very much one of the issues in the suit. She also submitted that this was the reason why the additional evidence in the context of the plea for regularisation should be allowed by this Court. Therefore, even this point is proposed to be considered at the urging of the appellants.

#### **REGULARIZATION OF ENCROACHMENTS/ILLEGAL CONSTRUCTIONS:**

44. Insofar as the first point is concerned, to begin with, reference to the plaint would be necessary to understand the appellant's case. The appellant has pleaded that the trigger or the cause of action for the institution of the suit is the impugned notice/order dated 24.01.2011 made by the third respondent and received by the appellant on 09.02.2011.

45. The appellant, in paragraph 3 of the plaint has very vaguely pleaded that the suit house, constructed by him on the Comunidade property, *"is duly consented and permitted by defendant no.4 and even otherwise the same is within the knowledge of defendant no.4"*.

46. In paragraph 5 of the plaint, there are general allegations about how the impugned order dated 24.01.2011 is issued without application of mind and “*is totally false*”. There are averments that the third respondent is acting in “*total abuse of powers under the Code of Comunidades*” or that the third defendant “*has no jurisdiction to issue the said order and therefore the said order being illegal is required to be declared as null and void*”.

47. In paragraph 6 of the plaint, there are averments that the third and fourth respondents are against the appellant because he is an outsider. There are averments about the third and fourth respondents acting “*on the instructions of vested interests*” or “*under the influence of certain section of highly influential people*”.

48. In paragraph 7 of the plaint, there are allegations that the impugned order is illegal “*inasmuch as no notice or inquiry is initiated nor norms of judicial procedure are adhered as required to be mandatory followed whilst exercising powers by the quasi judicial authorities*”. There are allegations that the appellant was condemned unheard and without affording any opportunity to show cause to any notice. There is a bald averment that no notices of whatsoever nature were issued to the appellant. In paragraph 9 of the plaint, it is stated that “*the said order is arbitrary and bias and is not sustainable under law*”.



49. In paragraph 11 of the plaint, there is reference to the Goa Land (Prohibition on Construction) Act, 1995 and it is pleaded that the fourth respondent was fully aware and had permitted the appellant to construct the house and, therefore provisions of this Act would not be applicable to the appellant. In paragraph 12 of the plaint the appellant has referred to “*final notice dated 15<sup>th</sup> June 2009 which was appealed before the Administrative Tribunal*”. There are also pleadings about how the Administrative Tribunal dismissed the appeal on the ground that the same was not maintainable and how the appellant filed appeal before the Under Secretary (Revenue), Government of Goa who redirected the appeal to the Collector vide his letter dated 09.04.2010. After that the allegation is that the second respondent did not issue any notice to the appellant before passing the order dated 24.01.2011. By way of amendment it was pleaded that the order dated 09.11.2010 was also illegal and was required to be set aside.

50. In paragraph 13 of the plaint, it is pleaded that the matter is “*sub-judice before the Village Panchayat of Tivim*”. On this ground, by way of amendment it was urged that even the show cause notice dated 18.02.2011 issued by the Panchayat should be declared as null and void. In paragraph 14 of the plaint there is a bald statement that the house was constructed by the appellant and his mother in 1997 but was electrified since 2005 and provided water connection since 2007. There are averments about how the structure can be regularized. In this paragraph there are averments about seeking directions to the second defendant to regularize the construction. However, as noted

earlier, prayer clause was rejected by the trial court and such rejection was upheld by this Court.

**51.** Thus, in the entire plaint, the appellant, after ambiguously admitting that he had constructed the suit house on the Comunidade property, has nowhere pleaded about the authority with which such a construction was put up by him. The only averment in paragraph 3 of the plaint was that the house was duly consented and permitted by the Comunidade or that the same was within the knowledge of the Comunidade. At this stage, it is necessary to note that there were not even any pleadings in the plaint about NOC issued by the clerk of the Comunidade on 04.05.2005.

**52.** The NOC dated 04.05.2005 was produced by the appellant in his evidence without any pleadings to back the same. The trial court has justifiably cast doubts upon the authenticity of this NOC dated 04.05.2005 and virtually identical NOCs produced in the connected matters under the signature of one Mohan Narvekar, the clerk of Comunidade of Tivim.

**53.** On re-evaluating the evidence regards the NOC at Exh.67, it is apparent that the same bears no reference number or outward number. The clerk has signed this NOC. Under the Code of Comunidades, the clerk has no authority whatsoever to issue such NOCs. No provisions under the Code of Comunidades was shown by the appellants or their counsel in support of a clerk's authority to issue such NOC. The NOC

refers to a decision of the Managing Committee of Tivim. If this phrase means and implies Managing Committee of Comunidade de Tivim, no such decision is produced. The Comunidade has clearly stated that there was never any such decision taken assuming that such a decision could have been taken by the Managing Committee of Comunidade on its own.

54. Moreover, the NOC simply states that the Comunidade has no objection to grant an area of 100 sq.mtrs. of Comunidade property surveyed under no.343/14 to the appellant “*provided that he should comply with all legal formality as per the prevision of Comunidade*”. This means that the NOC, assuming that it is genuine or authentic only informed the appellant that the Comunidade would have no objection if the appellant complies with all legal formalities as per the Code of Comunidade for a grant of 100 sq.mtrs. of Comunidade property. Based upon such an NOC there was no question of the appellant encroaching upon the Comunidade property and proceeding to put up a construction without bothering to obtain permissions from any of the authorities like the Panchayat, Planning Authorities, Health Authorities, etc. as are normally required for putting up such constructions.

55. Besides, there is no explanation whatsoever why no reference was made to this NOC dated 04.05.2005, which appears to be the appellant’s star document, in the plaint or the pleadings in the plaint. In the evidence, PW1 stated that the house was constructed based upon the NOC dated 04.05.2005.

Still, to bring the appellant's case under Article 372-A of the Code, there are vague averments about how the construction was put up before 15.06.2000. There are serious inconsistencies in the appellant's case. It is apparent that a false case was set up by the appellant only to prevent the lawful execution of the orders made by the authorities under the Code of Comunidades for removal of encroachment on the Comunidade property.

56. Mrs Agni admitted that there was no substantial documentary evidence about the construction being put up before 15.06.2000. However, she submitted that there was oral evidence. Further, she admitted that by oral evidence, she meant the depositions of the appellants/plaintiffs themselves and, further, the appellants and plaintiffs in the connected cases deposing in favour of each other. Even Mr Costa Frias and Ms Mordekar pointed out that there were no independent witnesses, but the various appellants/plaintiffs had deposed in favour of one another. Even the trial court has commented upon such self-serving evidence.

57. The trial court also correctly observed how it would be inconceivable that there was no shred of documentary evidence in support of the constructions being put up before 15.06.2000. Most of the documents produced are post-2005. They correspond to the timing of the issue of the NOC dated 04.05.2005, whatever may be the legal efficacy or the intrinsic worth of such a NOC issued by the clerk of the Comunidade. Besides, there is no explanation about whether the appellants were

living in such houses without any electricity supply water supply and how these essential facilities were availed only from 2005 to 2007 but not at any time before 15.06.2000. Even the documents like Ration Cards, etc. produced on record by the appellants do not refer to their residence prior to 15.06.2000 in the suit house or houses.

**58.** Mrs Agni only referred to the residential certificates issued by the Mamlatdar in some of the cases. The residential certificates speak about the residence of the appellants for the last fifteen years. Some of the residential certificates refer to house numbers, and others do not. From this, it was urged that the residences must have been put up before 15.06.2000. On a preponderance of probabilities, such a contention cannot be accepted, particularly because of the other evidence on record, which refers to the years beyond 2005. The trial court has duly considered the oral evidence, and there is no reason to take any different view from that which the trial court takes. The oral evidence, even upon reassessment, inspires no confidence.

**59.** The documentary evidence, on a preponderance of probabilities, supports the respondents' case that the constructions were put up around 2005 or 2006 and certainly not anywhere before 15.06.2000. Thus, from the pleadings as well as the oral evidence on record, it is apparent that the appellants are rank encroachers on the Comunidade land, and such encroachments or constructions were made around the years 2005-2006, but not before 15.06.2000. The Appellants had no

authority whatsoever to construct any houses or structures on Comunidade land. The finding about the lack of genuineness of the NOC dated 04.05.2005 and similar NOCs must be sustained by looking at the several suspicious circumstances in which it is surrounded.

**60.** However, even if it is assumed that the clerk had issued the NOC, under the Code of Comunidades the clerk had no authority whatsoever to issue such certificates. Even the Managing Committee had no authority. The alienation of the Comunidade properties requires approval from the Government. The Comunidade properties cannot be frittered away based upon such NOC even by the Comunidades themselves. The provisions of the Code of Comunidades and legal precedents on the issue are quite clear.

**61.** Therefore, based upon an extremely doubtful document and, in any case a document issued without any authority whatsoever, the appellants cannot claim any right to the Comunidade property which they have, with impunity encroached upon. The NOC, even if it is assumed to be authentic, does not even allot any Comunidade property to the appellants. The NOC simply declares no objection to allotment should the appellants comply with all legal formalities as per the provisions of the Code of Comunidades. Admittedly, the appellants have not bothered to comply with any of the formalities prescribed under the Code of Comunidades for securing allotment of Comunidade property.

62. One of the prerequisites of Article 372-A is that the structure must have been constructed before 15.06.2000. Upon assessment of the oral and documentary evidence on record, it is apparent that the appellant's structure was not put up before 15.06.2000. Therefore, even by Mrs Agni's interpretation of the provisions of Article 372-A and the ruling in *Martha Luis (supra)* upon which she placed heavy reliance, there is no question of regularising the appellant's structure. The issue (c), which was pressed even in this appeal, is, therefore, required to be answered against the appellant or the appellants in the connected appeals.

63. The additional evidence now produced by the appellants only concerns the applications for regularisation made by the appellants and the correspondences in that regard. Even the appellants' contention in the application under Order 41, Rule 27 was that this evidence is relevant in the context of the issue as to whether the appellant's structure deserves to be regularised. Even upon consideration of all such documents, it is not possible to hold that the appellant's encroachment on Comunidade lands can be regularised.

64. The first document is only the Under Secretary's communication to the Collector dated 09.04.2010, by which the appellant's appeal, which was not even maintainable, was referred to the Collector. The second document is the representation dated 21.03.2011 made by the appellants to the Minister for Revenue seeking regularisation of the structure. The third document is the OSD to the Revenue Minister's communication

dated 10.05.2011, requiring the Collector to examine the matter. The fourth document is a similar communication. The fifth document concerns the Deputy Collector cancelling demolition, which was scheduled. The sixth document is again a representation to the Collector on the issue of regularisation.

65. The Seventh document is a receipt from the Panchayat about house tax, light tax for the years 2005-2006 and electricity bills. Based on this evidence, the finding that the structures were not put up before 15.06.2000 is strengthened. The evidence on record shows that the structures were put up in and around 2005-2006. The documents now produced also show that they were assessed to house tax in 2005-2006. Even the electricity bills are from 2008. Therefore, even after considering these documents, the issue regarding regularisation will have to be answered against the appellants.

66. The eighth document is the NOC dated 04.05.2005, which is already considered, and there was no necessity for reproducing the same. The ninth document is the residence certificate, which is also discussed earlier. Based on this residential certificate, it is not possible to hold that the structure was put up before 15.06.2000. Besides, this document was issued on 21.12.2012. Still, the same was produced before the trial court during evidence. There is no explanation why this was not done. If this was done, possibly the Mamlatdar could have been summoned to depose in the matter and disclose the basis on which such a certificate was issued.



67. The tenth document is the election identity card which is again dated 20.12.2008. The eleventh document is the first page of the ration card which was again issued sometime in 2008, or in any case the dates on the ration card are not clear. Therefore, even after considering the additional evidence no case is made out to answer the issue of regularization in favour of the appellants.

68. Since the above issue is required to be answered against the appellants, there is no need to go into the details of the further issue of whether an application for regularisation of a structure put up before 15.06.2000 is required to be made within 250 days from the coming into force of Article 372-A of the Code. Article 372-A came into force vide Amendment Act 46 of 2001 w.e.f. 04.07.2001. Therefore, the period of 250 days mentioned in Article 372-A(1) would end on 10.03.2002. Admittedly, in this case, applications for regularisation were made almost seven to eight years after 10.03.2002.

69. Mrs Agni, however, relied upon an observation in paragraph 19 of *Martha Luis (supra)*, which reads as follows:-

*“19. Neither from the Rules nor the provisions of the Code, the learned Counsel for the parties were able to point out whether there exist any provisions prescribing cut-off date for making applications for regularisation. All that Article 372-A of the Code requires is that the encroachments, including, by way of construction of house for residential*

*purpose therein must have taken place on or before 15.06.2000. Therefore, nothing really turns upon the date on which the applicant applies for regularisation of the encroachments. At the highest, the date may assume importance in the context of determination of the rate at which the penalty and annual lease rent is to be determined.”*

**70.** From the perusal of the decision in *Martha Luis (supra)*, which I incidentally authored, it is apparent that the issue as to whether any application made beyond 250 days from the date of coming into force of Article 372-A of the Code did not squarely arise. Besides, paragraph 19 refers to the learned counsel for the parties being unable to point out from the rules or provisions of the Code any provisions prescribing a cut-off date for making applications for regularisation. This does not relieve the Court from finding such a provision. However, in the said matter, the provision about making an application within 250 days or 90 days was missed, possibly because this was not at all the main issue involved in the matter. The main issue involved in the matter was about the rate of penalty that could be charged and whether there was discrimination involved in determining the rate of penalty.

**71.** Otherwise, *Martha Luis (supra)* holds that the provisions of Article 372-A are a one-time exception, and there is no question of either Comunidades or State Government expanding, unduly, the scope of such exception. From the

perusal of provisions of Article 372-A, which are quoted hereafter for the convenience of reference, it does appear that an application for regularisation has to be made within 250 days from the date Article 372-A came into force, i.e. within 250 days from 04.07.2001. From the text and the context, Mrs Agni's argument that this period is only directory cannot be accepted. Article 372-A, by way of exception, provides for a window period to seek regularisation. Even Article 372-A(2) provides for what should happen to the illegal encroachments on the Comunidade lands for a period of 250 days from the coming into force of Article 372-A or during the pendency of a valid application under Article 372-A. If such a time limit is construed as directory, the entire structure of Article 372-A will falter. Such a construction, apart from being contrary to the plain words of the Article, would also be contrary to the obvious intention of the Legislature in this case. The Court is not concerned in these matters with the constitutional validity or otherwise of Article 372-A of the Code of Comunidades.

**72.** Therefore, the argument about the observations in paragraph 19 of *Martha Luis (supra)* being *per in curium* or in the nature of an obiter dictum cannot be lightly brushed aside. However, there is no need to go into this issue because the evidence on record in all these appeals establishes that the constructions put up by the appellants were not before 15.06.2000, which, even according to *Martha Luis (supra)* was the cut-off date for a construction to be in existence before any

regularisation of such construction could be sought within the time limit prescribed or otherwise.

**73.** Accordingly, the first point for determination formulated by this Court or the issue (c) cast by the trial Court, which was pressed even in this appeal, is, therefore, required to be answered against the appellant or the appellants in the connected appeals.

**74.** The position of pieces of evidence in the connected appeals on the issue of the construction being before 15.06.2000 is not different. In the charts prepared for the assistance of the Court, there is a reference to the documentary evidence relied upon by each of the appellants. The documents are mostly post-2005, and therefore, the reasoning in the context of First Appeal No.12/2020 will squarely apply to the other appeals as well. The evidence is almost the same, with some small variations here and there which are not of much significance. The issues framed in each of the suits in the context of the regularisation are, therefore, required to be answered against the appellants.

### **THE NATURAL JUSTICE ARGUMENT:**

**75.** Regarding the second point for determination, from the material on record, it is apparent that there was no breach of the principles of natural justice and fair play. The principles of natural justice cannot be cabined in a straitjacket. An unnatural expansion of principles of natural justice is impermissible. In the present case, the records bear out that a show cause notice dated

06.04.2009 was duly issued to the appellants. The appellants filed their response to the show cause notice. Upon due consideration of the response, a final demolition order was made on 15.06.2009. The appellant had not even complained about the failure of natural justice before this order was made.

**76.** The appellant challenged this order before the Tribunal by instituting an appeal, which was dismissed as not maintainable, it is significant that the appellant did not challenge the Tribunal's order dated 25.02.2010 before this Court by instituting petition under Article 226 or 227 of the Constitution. Instead, the appellant made a representation, which the appellant now calls an appeal to the Under Secretary (Revenue) or to the Government. No provisions under the Code of Comunidades were shown under which such a representation or appeal lay. Still, the Under Secretary (Revenue), requested the Collector to investigate the matter. After that, even though it was not necessary, yet another show-cause notice dated 07.04.2010 was issued to the appellant. This second opportunity was completely unnecessary.

**77.** The Collector, conscious that the Administrator was the competent authority, referred the matter to the Administrator. The Administrator, relying upon the final demolition order dated 15.06.2009, which was issued after full compliance with the principles of natural justice, made the impugned order dated 24.01.2011 only to execute the final notice dated 15.06.2009 now that it had attained finality.

78. Therefore, this was not at all a case of breach of natural justice or principles of fair play. Full opportunity was granted to the appellant before the final demolition notice dated 15.06.2009 was made. There is nothing like a mere technical breach of principles of natural justice. In the facts of the present case, the appellants were required to plead and prove prejudice. All that the appellants had to say, the appellants had already said before the final notice dated 15.06.2009 was issued to them after considering their cause.

79. In *Aligarh Muslim University v/s. Mansoor Ali Khan (2000) 7 SCC 529*, it was held that there is no absolute rule, and prejudice must be shown depending on the facts of each case, as follows:

*‘24. The principle that in addition to breach of natural justice, prejudice must also be proved has been developed in several cases. In K.L. Tripathi v. State Bank of India [(1984) 1 SCC 43] Sabyasachi Mukharji, J. (as he then was) also laid down the principle that not mere violation of natural justice but de facto prejudice (other than non-issue of notice) had to be proved. It was observed, quoting Wade's Administrative Law (5th Edn., pp. 472-75), as follows: (SCC p. 58, para 31)*

*“[I]t is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent. ... There must also have been some real*

*prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with, and so forth.”*

80. Since then, the Hon’ble Supreme Court has consistently applied the principle of prejudice in several cases. The above ruling and various other rulings taking the same view have been exhaustively referred to in *State Bank of Patiala v. S.K. Sharma* [(1996) 3 SCC 364]. In that case, the principle of “prejudice” has been further elaborated. The same principle has been reiterated again in *Rajendra Singh v. State of M.P. -* [(1996) 5 SCC 460].

81. In *State of U.P. v/s. Sudhir Kumar Singh & Ors. – 2020 SCC OnLine SC 847*, the Hon’ble Supreme Court considered several decisions on natural justice and has held that breach of the breach of the *audi alteram partem* rule cannot by itself, without more, lead to the conclusion that prejudice is thereby caused. Where procedural and/or substantive provisions of law embody the principles of natural justice, their infraction per se does not lead to invalidity of the orders passed. Here again, prejudice must be caused to the litigant, except in the case of a mandatory provision of law which is conceived not only in individual interest but also in public interest. No prejudice is caused to the person complaining of the breach of natural justice

where such a person does not dispute the case against him or it. This can happen by reason of estoppel, acquiescence, waiver and by way of non-challenge or non-denial or admission of facts in cases in which the Court finds on facts that no real prejudice can, therefore, be said to have been caused to the person complaining of the breach of natural justice. In cases where facts can be stated to be admitted or indisputable, and only one conclusion is possible, the Court does not pass futile orders of setting aside or remand when there is, in fact, no prejudice caused. The Court must draw this conclusion on an appraisal of the facts of a case and not by the authority that denies natural justice to a person.

**82.** The decision in *Canara Bank (supra)* proceeds on the facts which are not even remotely comparable to the facts in all these appeals. That was a matter of disciplinary proceedings, and in the context of the disciplinary proceedings, observations were made about the importance of compliance with principles of natural justice and fair play. Incidentally, the trial court relied upon *Secretary, Andhra Pradesh Social Welfare Residential Educational Institutions (supra)* in support of the useless formality theory. This was sought to be distinguished by Mrs Agni on the grounds that this decision pertains to service matters. Also, the decision in *Canara Bank (supra)* pertains to a service matter. Therefore, this kind of distinction cannot be accepted. The distinguishing feature of the present case is that admittedly, all the appellants were given full opportunity before the final notice of demolition was issued to them. The impugned order only enforces this final notice, and at that stage, there was no



necessity to give once again opportunity of hearing or an opportunity to show further cause to any of the appellants. It is apparent that the suit was instituted only to delay the execution of the final notice.

**83.** The trial court, in this case, has quite correctly invoked the useless formality theory to the appellants despite opportunity before the final demolition notice was made or throughout the decade-long pendency of the civil suits, have failed to show even some reasonable or probable cause based upon which their encroachments could be protected. Therefore, urging failure of natural justice but without showing even the slightest of prejudice or rather without demonstrating what cause they could have shown after the final notice dated 15.06.2009 was issued cannot be a good ground to fault the impugned orders dated 24.01.2011 on the grounds of failure of natural justice.

**84.** For all the above reasons, the second point for determination will have to be answered against the appellants.

**PENDENCY OF REGULARISATION PROCEEDINGS ARGUMENT:**

**85.** Insofar as the third point for determination is concerned, as noted earlier, there is overwhelming evidence to show that the constructions put up by the appellants were not before 15.06.2000. The oral and documentary evidence in this regard is discussed above. Once this is established, there is no question of regularising the structures which have come up post-

15.06.2000. There is also a serious issue of whether applications filed beyond 250 days from coming into force of Article 372-A can at all be considered. There is no doubt that the applications on which the appellants rely were made almost seven to eight years after the expiry of this 250-day window period.

**86.** This is a case of brazen and high-handed usurpation of the Comunidade property. Such encroachers cannot insist upon regularisation as a matter of an absolute right. There are several decisions which hold that the community has an interest in protecting the Comunidade properties. Even the Comunidades cannot fritter away their own properties without following provisions of the Code of Comunidades and without obtaining the approval of the Government. Even the Government cannot allot Comunidade properties by ignoring provisions of the Code of Comunidades.

**87.** Unfortunately, the Comunidade properties have become easy prey for encroachers. In many cases, this is on account of the failure of the Managing Committees or the employees of the Comunidades to protect the Comunidade properties. On many occasions, NOCs without any authority of law are issued by the Comunidade officials without the backing of resolutions of the Comunidades for extraneous considerations. Such NOCs are issued mostly by Comunidade officials without even the slightest authority to do so. These clerks and attornies are emboldened by the fact that very rarely any action is initiated against them. Even the managing committees take umbrage from

the circumstance that their tenures are limited, and if their misdeeds are not detected during their tenure, most often, they go scot-free. The rank encroachers, as these cases demonstrate, litigate for a minimum of two decades by filing all sorts of proceedings before several Courts, quasi-judicial and administrative authorities basically to delay the action against encroachments. The State, which has powers of tutelage over Comunidades, is also not vigilant to protect the properties of the Comunidades. As a result, encroachments on Comunidade properties have become rampant over the years. These heritage institutions that are reputed to have been founded hundreds of years ago as *gaunkari*, are on the brink due to this malaise of rampant encroachments.

88. In the case of *Raghupati Bhandari (supra)*, the Division Bench of this Court referred to the decision of the Hon'ble Supreme Court in *Chenchu Rami Reddy v/s. Government of Andhra Pradesh – (1986) 3 SCC 391* in which the Hon'ble Supreme Court, in the context of devasthan property observed:-

*“More often than not a detriment to what belongs to ‘many’, collectively, does not cause pangs to ‘any’, for no one is personally hurt directly. That is why public officials and public-minded citizens entrusted with the care of ‘public property’ have to show exemplary vigilance. What is true of ‘public property’ is equally true of property belonging to religious or charitable institutions or endowments. The Hon'ble Supreme Court concluded by observing that the property of such institutions or*

*endowments must be jealously protected. It must be protected, for, a large segment of the community has a beneficial interest in it (that is the raison d'etre of the Act itself). The authorities exercising the powers under the Act must not only be most alert and vigilant in such matters but also show awareness of the ways of the present-day world as also the ugly realities of the world of today. They cannot afford to take things at their face value or make a less than the closest-and-best-attention approach to guard against all pitfalls. The approving authority must be aware that in such matters the trustees, or persons authorized to sell by private negotiations, can, in a given case, enter into a secret or invisible underhand deal or understanding with the purchasers at the cost of the concerned institution. Those who are willing to purchase by private negotiations can also bid at a public auction. Why would they feel shy or be deterred from bidding at a public auction? Why then permit sale by private negotiations which will not be visible to the public eye and may even give rise to public suspicion unless there are special reasons to justify doing so? And care must be taken to fix a reserve price after ascertaining the market value for the sake of safeguarding the interest of the endowment.”*

The Division Bench applied the above observations in the context of Comunidade property. The SLP against this decision was dismissed by the Hon'ble Supreme Court by order dated 19.09.2022 in Special Leave Petition No. 6767/2022.

89. Recently, in *Ramnath alias Devanand Naik (supra)*, this Court interfered with the allotment of a Comunidade plot on a permanent lease without following provisions of the Code of Comunidades. This was even though the general body of the Comunidades had supported such a grant. However, there was neither any approval from the Government nor were the provisions of the Code of Comunidades regarding allotment complied with. This Court held that an allottee based upon such a void ab initio allotment was nothing but an encroacher or trespasser on Comunidade lands.

90. Even in *Martha Luis (supra)* which was relied upon by Mrs Agni, the Division Bench of this Court has held that the Comunidades are under the tutelage of the State Government and, therefore, there is duty and responsibility cast to the State Government to ensure that the Comunidade lands are not frittered away particularly by encroachments. *Syed Muzaffar Ali (Supra)* was a case involving compoundable breaches of the municipal or planning laws on Petitioner's own property. This is a case of brazen encroachment by the appellants on the Comunidade property. Incidentally, such encroachment involved construction without obtaining permission from any of the several statutory authorities. Even otherwise, the decision cited has been explained as applying to some unintended deviations from the approved plans, provided such deviations were within the overall permissible limits prescribed by the law.

91. Thus, even the third issue about regularisation urged on behalf of the appellants is required to be answered against the appellants. Accordingly, the third point for determination will have to be answered against the appellants in each of these appeals.

92. Ms Sulekha Kamat's contention about the suits not being maintainable is not required to be decided in these appeals because, even if the suits are held to be maintainable, they have been rightly dismissed on merits or because of lack of merits. There is no case made out for interfering with the impugned judgments and decrees.

### **CONCLUSION:**

93. For all the above reasons, all these appeals are liable to be dismissed and are hereby dismissed. The miscellaneous civil applications under Order 41, Rule 27 of CPC are disposed of in the above terms.

94. The other civil applications for stay, etc., do not survive, and the same are also disposed of.

**M. S. SONAK, J.**

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